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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RODNEY DALE REEDER,

Defendant and Appellant.

F037182

(Super. Ct. No. 1002735)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Edward M. Lacy, Jr., Judge.

Barbara Michel, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Louis M. Vasquez and Kathleen A. McGurty, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Dibiaso, Acting P.J., Buckley, J., and Levy, J.

On August 3, 2000, a Stanislaus County jury found Rodney Dale Reeder guilty of manufacturing methamphetamine. (Health & Saf. Code, § 11379.6, subd. (a).) The trial court determined Reeder was addicted or in imminent danger of becoming addicted to a controlled substance and committed him to the California Rehabilitation Center for a five-year maximum term. (Welfare & Inst. Code, § 3051.) On appeal, Reeder contends: (1) an illegal search and seizure produced the evidence against him, (2) his trial counsel was ineffective for not moving to suppress the evidence, and (3) the trial court improperly gave a jury misconduct instruction under CALJIC No. 17.41.1. We will affirm.

STATEMENT OF THE FACTS

Bruno Markett owned two small, dilapidated buildings in Modesto that he wanted to demolish. Markett was aware a couple was living on the property without his permission and asked the Stanislaus County sheriff for assistance in removing the trespassers.

On January 26, 2000, Markett and two sheriff's deputies knocked on the door of one of the buildings and announced their presence. The door creaked open and the deputies saw Reeder and a woman inside. The officers informed the couple they were trespassing, detained them in a patrol car, and continued to investigate the property.

After obtaining Markett's agreement, the deputies searched the adjacent building where they found a second woman, along with chemicals and equipment commonly used to produce methamphetamine. The deputies contacted the Stanislaus County Drug Enforcement Agency, who also searched the property and found additional evidence indicative of methamphetamine production.

Although Reeder denied knowledge of any drug making chemicals or equipment, he admitted he had been in every part of the adjacent building. Further, a local store's records revealed Reeder had twice purchased crystallized iodine, a chemical used in manufacturing methamphetamine.

DISCUSSION

I. *Admissibility of Evidence*

Reeder contends the evidence used against him to obtain his conviction was the product of an unconstitutional search and seizure in violation of the Fourth Amendment of the United States Constitution. We agree with the Attorney General that Reeder waived the validity of the search by not raising at trial a motion to suppress the evidence.

Penal Code¹ section 1538.5 provides a trial procedure to move to suppress evidence obtained as a result of an unreasonable search or seizure. In order to challenge the admissibility of evidence on appeal, a defendant must have raised a section 1538.5 motion at trial. (§ 1538.5, subd. (m); *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.) On appeal, our task is to review the correctness of the trial court's ruling denying a motion to suppress. Here, Reeder concedes his trial counsel never moved to suppress the evidence.

This court cannot review the correctness of a ruling that was never made. “ ‘[I]t would be wholly inappropriate to reverse a superior court's judgment for error it did not commit and that was never called to its attention.’ ” (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896; in accord, see also *People v. Ochoa* (1998) 19 Cal.4th 353, fn. 1, p. 392.) Accordingly, Reeder has waived his objection to the admissibility of evidence resulting from the search of Markett's property.

II. *Ineffective Assistance of Counsel*

Reeder argues in the alternative that the failure to properly preserve the evidence admissibility issue constituted ineffective assistance of counsel. We disagree.

In order to demonstrate counsel was constitutionally ineffective, an appellant must make an affirmative showing counsel failed to act in a reasonable manner and that there

¹ All further statutory references are to the Penal Code unless otherwise noted.

was a reasonable probability the outcome would have been different if counsel acted reasonably. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217.) If the challenged action was the result of an informed tactical choice among the range of reasonable actions, then counsel acted effectively. (*People v. Pope* (1979) 23 Cal.3d 412, 425-426.) “In some cases, however, the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal.” (*Id.* at p. 426, fn. omitted.)

Here, we cannot determine whether Reeder’s trial counsel’s failure to move to suppress the evidence was the result of an informed tactical choice. Although Reeder contends trial counsel should have been aware the deputies violated his reasonable expectation of privacy because he was an overnight guest of individuals authorized to reside on the property, the owner of the property testified otherwise. The prosecution may have possessed evidence undisputedly demonstrating that Reeder lacked standing to claim a reasonable expectation of privacy or that the search was otherwise proper. Thus, Reeder’s trial counsel may have decided that a motion to suppress would have been futile. While some facts arguably relevant to the question of Reeder’s expectation of privacy were elicited at trial, we cannot apply those limited facts so as to guess the results of a suppression hearing had one been held. (*People v. Mendoza Tello, supra*, 15 Cal.4th at p. 266.) By failing to establish his counsel acted unreasonably, Reeder does not demonstrate his representation was ineffective.

II. *Jury Instructions*

Reeder lastly contends the trial court committed reversible error when it instructed the jury with CALJIC No. 17.41.1 as follows:

“The integrity of a trial requires the jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or express an intention to disregard the law or to decide the case based on any other

improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.”

Reeder believes the instruction deprived him of his rights to a fair jury trial, private jury deliberations, and independent judgment of each juror. Reeder also maintains the instruction infringed on the jury’s power of nullification.

The general propriety of CALJIC No. 17.41.1 is currently pending before our Supreme Court in *People v. Engleman* (2000) 77 Cal.App.4th 1297, review granted April 26, 2000, (S086462) and *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted August 23, 2000, (S088909). Reeder’s argument regarding the jury’s power of nullification is meritless in light of the Supreme Court’s recent decision in *People v. Williams* (2001) 25 Cal.4th 441, 463, which concluded there is no such right. (*People v. Brown* (2001) 91 Cal.App.4th 256, 271.)

Even assuming our Supreme Court concludes that it is error to give CALJIC No. 17.41.1, reversal is warranted only if Reeder was prejudiced by the instruction. (*People v. Brown, supra*, 91 Cal.App.4th at p. 271; *People v. Molina* (2000) 82 Cal.App.4th 1329, 1335-1336.) Here, we find any error in providing the instruction was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) The jury reached its verdict in under three hours. “There were no holdout jurors, no jury deadlock, and no reports that a juror was refusing to deliberate or follow the law.” (*People v. Linn* (2001) 90 Cal.App.4th 1354, 1366.) Finally, “[t]here is no indication any juror intended to act contrary to the law or that CALJIC No. 17.41.1 had any [e]ffect on this case whatsoever.” (*People v. Brown, supra*, 91 Cal.App.4th at p. 271.) Reeder was simply not prejudiced by CALJIC No 17.41.1.

DISPOSITION

The judgment is affirmed.